IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

VINCENT ANTHONY BUSH,

PETITIONER,

-VS-

STATE OF FLORIDA,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF
CERTIORARI TO THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

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JURISDICTION

Respondent acknowledges that jurisdiction, to the extent that the facts and circumstances of this case present a substantial federal question, would arise pursuant to 28 *U.S.C.* §1257(3). Respondent denies any evidence was secured as a result of an illegal arrest. A statement was taken from Petitioner after his arrest which was freely and voluntarily given after appropriate warnings (R 32), and the motion to suppress, quoted on page 3 of the petition, never alleged the statement was illegally obtained because it was the product of the warrantless arrest. Indeed, Petitioner in his motion to suppress never alleged the arrest was illegal because it was effected without a warrant and without probable cause.

QUESTION PRESENTED

WAS THE ARREST OF THE PETITIONER UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE A VIOLATION OF THE FOURTH AMENDMENT TO THE FEDERAL CONSTITUTION.

STATUTORY PROVISIONS INVOLVED

901.15 When arrest by officer without warrant is lawful.—A peace officer may arrest a person without a warrant when:
(1) The person has committed a felony or misdemeanor or violated a municipal ordinance in the presence of the officer. Arrest for the commission of a misdemeanor or violation of a municipal ordinance shall be made immediately or in fresh pursuit.

(2) A felony has been committed and he reasonably believes that the person committed it.

(3) He reasonably believes that a felony has been or is being committed and reasonably believes that the person to be arrested has committed or is committing it.

901.17 Method of arrest by officer without warrant.—A peace officer making an arrest without a warrant shall inform the person to be arrested of his authority and the cause of arrest except when the person flees or forcibly resists before the officer has an opportunity to inform him or when giving the information will imperil the arrest.

901.19 Right of officer to break into building.—
(1) If a peace officer fails to gain admittance after he has announced his authority and purpose in order to make an arrest either by a warrant or when authorized to make an arrest for a felony without a warrant, he may use all necessary and reasonable force to enter any building or property where the person to be arrested is or is reasonably believed to be.

901.21 Search of person arrested.—
(1) When a lawful arrest is effected, a peace officer may search the person arrested and the area within the person's immediate presence for the purpose of:
(a) Protecting the officer from attack;
(b) Preventing the person from escaping;or
(c) Discovering the fruits of a crime.
(2) A peace officer making a lawful serach without a warrant may seize all instruments, articles, or things discovered on the person arrested or within the person's immediate control, the seizure of which is reasonably necessary for the purpose of:
(a) Protecting the officer from attack;
(b) Preventing the escape of the arrested person; or
(c) Assuring subsequent lawful custody of the fruits of a crime or of the articles used in the commission of a crime.

STATEMENT OF THE CASE

Respondent accepts the Statement of the case as stated on pages two through seven of Petitioner's brief. Additional facts however are necessary to clarify the posture of this case.

Counsel for Petitioner was not trial counsel and the latter did not present the issue that was presented to the appellate court. Counsel for the State in answer to trial counsel's observation that the State ". . . Had a chance to get--to go before a court and get a warrant which they did not do. . ." (Pet. R 40) stated that the laws of Florida did not require an arrest warrant where a police officer has probable cause to believe the person has committed a felony (Resp. R 31). Trial counsel did not challenge the validity of Section 901.15, Florida Statutes, either on its face or as applied, which would have authorized an appeal to the Florida Supreme Court under Florida's Constitution, thus giving the Florida Supreme Court an opportunity to re-examine *State v. Perez*, 277 So.2d 778 (Fla.1973), *cert. den.*, 414 U.S. 1064 in light of both *United States v. Watson*, 423 U.S. 411 (1976) and *United States v. Santana*, 427 U.S. 38 (1976). Indeed, all trial counsel urged in response was that ". . . there was no probable cause. . ." (Resp. R 32).

On appeal counsel for Petitioner raised the question tendered but again did not contest the validity of Section 901.15, Florida Statutes, either on its face or as applied, which could have resulted in review by the Florida Supreme Court. *Snedeker v. Vernmar Ltd.*, 151 So.2d 439 (Fla.1963). By not specifically raising in the trial court the issue pressed in the district court of appeal and before this Court, existence or nonexistence of exigent circumstances was not explored or developed on the record. In short counsel for Petitioner reframed the issues in order to present the question tendered herein.

What Petitioner fails to point out to this Court is that the district court of appeal under Florida law was required to affirm on the basis of *State v. Perez*, supra, whether they agreed with the Florida Supreme Court or not, *Hoffman v. Jones*, 280 So.2d 431 (Fla.1973) because that court is bound to follow the case law set forth by said decision in the absence of a definitive holding to the contrary by the Florida Supreme Court or this Court.

Petitioner implies that the Flroida Supreme Court had an opportunity to re-examine *Perez* because he sought review in the Supreme Court. This is not so! As was previously noted, review could easily have been obtained by challenging the validity of the statute on its face or as applied, but was not. Moreover, in Petitioner's petition before the Supreme Court, he sought review on a point totally detached from the issue involved here. A copy of Petitioner's jurisdictional brief in support of his petition is included in Respondent's record at pages 33 through 43.

Respondent wishes to point out that no question was raised in the district court of appeal regarding the existence of probable cause by Petitioner. Therefore the implications and innuendos on page 19 of Petitioner's brief that there is ". . . serious doubt on [sic] whether the police really had probable cause. . ." should be seen for what it really is, to-wit: an attempt to paint the actions of the arresting officers as abusive and unreasonable. Johnny Winters' admission against penal interest rendered him reliable as a matter of law, *United States v. Harris*, 403 U.S. 573 (1971) and supported a finding of probable cause.

Additional facts deemed relevant to a disposition of this petition will be included in the argument portion of this response.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Respondent acknowledges that this Court will ultimately have to decide the abstract question of whether the Warrant Clause applies to arrests in the home, and if so, under what circumstances. Respondent submits, however, that this is not the case that should be utilized to do so.

First, it is beyond question but that the issues were not properly developed at trial thereby affording this Court the opportunity to dispose of the issues upon a record properly developed with that in mind. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Secondly, Petitioner has avoided presenting the issue to the Florida Supreme Court and that Court has not been given an opportunity to re-examine their decision in *Perez* which was decided without the benefit of *Watson* and *Santana*. That Court might well have construed Section 901.15 as being limited to arrests only in public places or where exigent circumstances exist. Before this Court disposes of this issue it should have the benefit of the decisions of the various state supreme courts and the United States Circuit Courts. Thirdly, amd more importantly, the instant arrest was effectuated in the daytime (Resp. R 3), without forcible entry (Resp. R 4) and did not involve any search of the dwelling. Under these circumstances, as contrasted with *Jones v. United States*, 357 U.S. 493 (1958) and *United States v. Killebrew*, 560 F.2d 729 (6th Cir. 1977), the arrest was not unreasonable. This is so because the arrest was for a grave offense (armed robbery) (Resp. R 5), and therefore a basis to believe the petitioner was armed; there was a basis to believe Petitioner was on the premises because it was his residence; and the entry was peaceful and in compliance with statutory authority. *Dorman v. United States*, 435 F.2d 385 (U.S. App.D.C. 1970). Additionally, since there was no search of the

premises, it cannot be urged the arrest was a mere ruse to effectuate an illegal search like that in *Vale v. Louisiana*, 399 U.S. 30 (1970). In short, this case falls within that class of peaceful daytime arrests which have been found not to be unreasonable or violations of the Fourth Amendment. *United States v. Fernandez*, 480 F.2d 726 (2d Cir. 1973) and *United States v. Hall*, 348 F.2d 837 (2d Cir. 1965), *cert.den.*, 382 U.S. 947 (1965); *Commonwealth v. Boswell*, 372 U.S. 237 (Mass. 1978).

Counsel's reliance upon search and seizure cases totally overlooks the fact that there is a significant difference between the two, *United States v. Hall*, supra, at 841-42 and *People v. Payton*, 408 N.Y.S.2d 395 (N.Y.App.1978). If the officers could have waited outside until Petitioner emerged and then lawfully arrested him, and they surely could, *United States v. Watson*, supra, what was so unreasonable about their proceeding to his home and after being admitted effecting an arrest? In *either* case, the arrest is accomplished without prior judicial approval.

In truth and in fact, a *person* like an automobile is mobile, *United States v. Hall*, supra, at 841, and just as this Court has upheld warrantless searches and seizures thereof based upon statutory authority, *Carrol v. United States*, 267 U.S. 132 (1925) and *Chambers v. Maroney*, 399 U.S. 42 (1970) against a Fourth Amendment challenge, the plethora of statutory authority for arrest without a warrant of persons based upon probable cause should be upheld for the same pragmatic reasons.

This Court has stated that it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant, *Gerstein v. Pugh*, 420 U.S. 103 (1975). It should not do so in this case for there is *nothing* to indicate that it was done in an unreasonable fashion or for illegal purposes.

If anything, it was in the good faith belief that the long-standing statutory law authorized it.

Florida law, although authorizing warrantless arrests of persons do not allow forcible entry into a building, Section 901.19, Florida Statutes, and forbids the search and seizure of items beyond the "immediate control" of the person arrested. Thus the statutes harmonize with *Jones* and *Chimel v. California*, 395 U.S. 752 (1969) and thus satisfy the commands of the Fourth Amendment.

This Court should decline to exercise its jurisdiction to review the judgment and sentence in this case for the record adequately demonstrates that the arrest, unaccompanied by any unlawful search and seizure, was not unreasonable as that term is used in the Fourth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari has been forwarded to Mr. Michael J. Minerva, Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 29th day of November, 1978.

Raymond L. Marky
Assistant Attorney General